

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

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HANCOCK II.
MAYER-KHINTUNTON
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ELOUISE PEPION COBELL, et al.,)
)
Plaintiffs,)
)
v.)
)
GALE A. NORTON, Secretary of the Interior, et al.,)
)
Defendants.)
_____)

Case No. 1:96CV01285
(Judge Lamberth)

INTERIOR DEFENDANTS' OPPOSITION
TO PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY
RESTRAINING ORDER AND MOTION FOR A PRELIMINARY INJUNCTION

Pursuant to Rule 65 of the Federal Rules of Civil Procedure and Local Civil Rule 65.1,
Interior Defendants respectfully submit the following opposition to plaintiffs' Emergency Motion
for Temporary Restraining Order and Motion for a Preliminary Injunction ("TRO Motion").

I. Plaintiffs' TRO Motion Presents Arguments That Are Not Ripe for
Review by the Court

At the outset, this Court should reject plaintiffs' TRO Motion because it disregards the
role of the Special Master in reviewing matters affecting Information Technology security issues,
as established by the Court's December 17, 2001 Consent Order Regarding Information
Technology Security ("Consent Order"). Pursuant to the Consent Order, the Court has directed
that the Special Master is to be provided notice and documentation by the Interior Department
with regard to plans or proposals to reconnect systems to the Internet. Consent Order, pages 5-7.
Moreover, and of particular import to the TRO Motion, the Consent Order provides that "the
Special Master shall verify compliance with this Consent Order and may conduct interviews with

Interior personnel or contractors and conduct site visits wherever information technology systems or individual Indian trust data is housed or accessed." Consent Order, page 7.

The TRO Motion is squarely based upon a confidential report, subject to a protective order issued by the Special Master, which was issued by one of the Special Master's experts based upon a site visit to the Office of Surface Mining's Denver Internet Portal ("OSM-Denver"). In other words, this matter is currently before the Special Master, the Special Master is fully aware of every item of information contained in the TRO Motion and additional relevant matters not contained in the TRO Motion, e.g., OSM-Denver's efforts to address issues raised by the confidential expert's report, and the Special Master has not ordered OSM-Denver disconnected from the Internet.

The Consent Order's well-defined procedures have been scrupulously observed by the Interior Department with regard to OSM: OSM submitted a proposal to reconnect OSM's systems, including the Internet portal in Denver; the Special Master's experts conducted a site visit and issued a report, which the Special Master promptly provided to the Interior Department; and OSM has provided further information to the Special Master. Plaintiffs, however, have chosen to disregard the process for review established by the Consent Order and have asked this Court to intercede before the Special Master's review has been completed. On these facts, alone, the TRO motion should be denied as not ripe for review.

II. Plaintiffs' TRO Motion Is Wholly Lacking in Merit and Should Be Denied by This Court

Even if this Court disregards the ripeness problem with the TRO Motion, plaintiffs' motion is wholly without merit and should be denied. In considering whether to grant an application for a temporary restraining order or a preliminary injunction, this Court must examine

(1) whether there is a substantial likelihood that the plaintiff would succeed on the merits, (2) whether the plaintiff would suffer irreparable injury if the injunctive relief is denied, (3) whether the granting of injunctive relief would substantially injure the other party, and (4) whether the public interest would be served by the granting of the injunctive relief. E.g., Davenport v. International Brotherhood of Teamsters, AFL-CIO, 166 F.3d 356, 360-61 (D.C. Cir. 1999) (citing Serono Laboratories, Inc. v. Shalala, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998)); Kudjodi v. Wells Fargo Bank, 181 F. Supp. 2d 1, 2 n. 2 (D.D.C. 2001) (application for temporary restraining order would be denied when plaintiffs failed to show substantial likelihood of prevailing on merits or irreparable harm). As we explain below, plaintiffs' TRO Motion, while being highly charged and inflammatory in its tenor, is fatally flawed because it is based upon unsupported and erroneous assumptions and allegations which render it incapable of satisfying any of the four elements required for the issuance of a TRO or a preliminary injunction.

A. Plaintiffs Have Not Demonstrated a Substantial Likelihood of Success on the Merits

The Consent Order provides, in pertinent part:

Interior Defendants may reconnect to the Internet any information technology system that does not house individual Indian trust data and that does not provide access to individual Indian trust data seventy-two (72) hours after providing actual notice with appropriate documentation to the Special Master and Plaintiffs' counsel or immediately upon concurrence of the Special Master;

....

Consent Order, pages 5-6. The OSM proposal for reconnection to the Internet was based upon this provision, and it included a certification that the systems to be reconnected did not house or provide access to "individual Indian trust data," as defined by the Consent Order. Letters dated December 21, 2001, and January 22, 2002 (attached as Plaintiffs' Exhibits 1 and 2 to TRO

Motion); see Consent Order, page 4 (definition of "individual Indian trust data").

In seeking a TRO, plaintiffs have the burden of demonstrating a substantial likelihood of success in showing that the OSM systems do, in fact, house or provide access to individual Indian trust data. Notwithstanding the wholly unsubstantiated allegations in the TRO Motion, plaintiffs make no showing that the Interior Department's certification was false or that the OSM systems do, in fact, house or provide access to individual Indian trust data.¹

Since plaintiffs cannot adduce any evidence of actual individual Indian trust data on any OSM IT systems, their only apparent basis for seeking emergency injunctive relief rests with their claim that OSM could not possibly have made a valid certification regarding the presence of individual Indian trust data because there is no established definition of this term within the Interior Department. TRO Motion at 1-2. In support of this position, plaintiffs rely upon a draft report prepared by the Computer Security Expert Assist Team ("CSEAT"), an organization within the Commerce Department's National Institute of Standards and Technology. TRO Motion at 2, n. 2, and Plaintiffs' Exhibit 3.

Plaintiffs' argument wholly disregards the fact that the Consent Order contains a definition of individual Indian trust data. See Consent Order, page 4. The Interior Department's OSM systems were certified in accordance with the definition set forth in the Consent Order, and plaintiffs have not submitted any evidence to contradict this certification.

¹ Subsequent to plaintiffs' filing of the TRO Motion, the Government provided the Special Master and plaintiffs' counsel with further information responsive to the Special Master's protected expert's report. After receiving this letter, which we will provide to the Court under seal, plaintiffs filed their "Notice of Supplemental Authority" in apparent recognition that their TRO Motion was not soundly grounded. As we explain further below, the Notice of Supplemental Authority also fails to provide any basis for concluding that the OSM systems house or provide access to individual Indian trust data.

Plaintiffs further argue that OSM's systems house or provide access to individual Indian trust data based upon a confidential, protected report of the Special Master's expert. While plaintiffs filed the expert's report under seal as Plaintiffs' Exhibit 4 to the TRO Motion, plaintiffs purported to disclose publicly the substance of this report, notwithstanding the Special Master's May 2, 2002 Protective Order and the legend appearing on the Special Master's transmittal letter accompanying the report, which stated that it was "CONFIDENTIAL" and "SUBJECT TO PROTECTIVE ORDER." Plaintiffs' Exhibit 4 (Special Master's June 24, 2002 transmittal letter). As we explain in the following paragraph, which is redacted from the non-confidential version of this pleading, plaintiffs' assertions based upon the expert's report are false, misleading, and without merit.

[NOTE: TWO PARAGRAPHS OMITTED FROM THIS PUBLIC FILING. THESE ARE INCLUDED IN INTERIOR DEFENDANTS' UNOPPOSED MOTION TO FILE UNDER SEAL DISCUSSION REGARDING PROTECTED REPORT ISSUED BY SPECIAL MASTER'S EXPERT.]

After plaintiffs were served with a copy of the Interior Defendants' Exhibit 1 (under seal), plaintiffs filed their "Notice of Supplemental Authority" which they assert confirms that OSM knew or should have known that its systems house or provide access to individual Indian trust data prior to the certifications submitted in support of the OSM reconnection proposal. Notice of Supplemental Authority ("Supp. Auth.") at 1. This filing only attaches an unexecuted Memorandum of Understanding ("MOU") among BIA, BLM, and OSM entitled "Management of

Coal Mining on Indian Lands." Supp. Auth., Plaintiffs Exhibit 1.²

Contrary to plaintiffs' assertion, nothing in the MOU establishes that OSM's systems house or provide access to individual Indian trust data. In fact, that term is not even used in the MOU, which plaintiffs implicitly concede by their assertion that the MOU "expressly contemplates Individual Indian Trust Data in its definitions section." Supp. Auth. at 2 (emphasis added). If, in fact, the MOU imposed upon OSM specific responsibilities for individual Indian trust data, it is fair to assume that the MOU would have done more than "contemplate" such data; such data would have been defined and such responsibilities would have been specifically delineated. Moreover, nothing in the three bullet points listed in plaintiffs' Notice of Supplemental Authority describe any specific role for OSM with regard to housing or providing access to individual Indian trust data. See Supp. Auth. at 2.

Indeed, a review of both the MOU and the December 1997 version of the MOU confirm that BIA – not OSM – has the responsibility for acting on behalf of the allottees. MOU, page 14, Article D.1; Interior Defendants' Exhibit 2, page 13, Article D.1. OSM's responsibilities are with regard to the environmental aspects of the Permit Application Package ("PAP"), as defined on page 3 of both versions of the MOU, and compliance with the permit issued under the Surface Mining Control and Reclamation Act of 1977. MOU, pages 3 and 14 (Article D.3); Interior Defendants' Exhibit 2, pages 3 and 13 (Article D.3).

As we explained earlier, the TRO Motion lacked any merit, even before considering the protected and confidential Special Master's expert's report. Plaintiffs' Notice of Supplemental

² Although the MOU is dated December 2001, it has not yet been executed and, in fact, the OSM's relationship with BIA and BLM is currently governed by an April 1997 MOU. Interior Defendants' Exhibit 2.

Authority, however, is an apparent concession that the actions taken by the Interior Defendants subsequent to their receipt of the Special Master's expert's report removes any previously arguable merits alleged in the TRO Motion. The Notice of Supplemental Authority, however, provides no further basis for this Court to find that plaintiffs are substantially likely to prevail on the merits.

Plaintiffs finally claim that the evidence they lack of any individual Indian trust data on OSM's IT systems could be found in the information that they asked for in their Seventh Request for Production. TRO Motion, page 3, n. 2. As they acknowledge, this issue has been fully briefed in connection with plaintiffs' Motion to Compel Production and, as with the issues of this TRO Motion, is also currently before the Special Master for decision. Id. Contrary to the allegations made by plaintiffs, id., Interior Defendants made no "admissions" – either direct or indirect – of the existence of individual Indian trust data on OSM systems in their response to the plaintiffs' Motion to Compel. Interior Defendants' response speaks for itself and is incorporated herein by reference. Suffice it to say that Interior Defendants made it quite clear in their response that the OSM systems do not contain any individual Indian trust data and that the previous certification to that effect is still accurate. See Defendants' Responses and Opposition to Plaintiffs' Motion to Compel.

Thus, for the reasons set forth above, plaintiffs cannot demonstrate that any individual Indian trust data is housed on or accessible by OSM's systems. They cannot demonstrate a substantial likelihood of success on the merits.

B. Plaintiffs Cannot Demonstrate Any Irreparable
Injury if Injunctive Relief is Denied

Since plaintiffs have not provided a scintilla of evidence that individual Indian trust data is housed or accessible by OSM's systems, it follows that they also have failed to meet their burden of showing irreparable injury should their request for emergency injunctive relief be denied. Since there is no such data on the OSM systems, there can be no harm, much less irreparable harm, if the OSM systems remain connected to the Internet. Moreover, as discussed above, because this issue is currently before the Special Master, this Court should defer to the Special Master for his review of the issue. Suffice it to say, if the Special Master concludes that individual Indian trust data is at risk on OSM's systems, the Consent Order contemplates that he, initially, will act upon such concerns.

C. The Granting of Injunctive Relief Would
Substantially Injure the Government

If the emergency relief requested by plaintiffs is granted, the Government and the public will suffer substantial injury. The responsibilities of OSM are statutorily prescribed in 30 U.S.C. § 1211 and include the administration of a broad array of programs for controlling surface coal mining and reclamation operations. See 30 U.S.C. § 1211(c) (setting forth 13 categories of duties to be carried out by OSM). As the Court is aware, any abrupt disconnection from the Internet will entail substantial disruption to the functions and activity of OSM personnel. Such harm to the Government and the public is even more unjustifiable in light of the already-established Consent Order process whereby the Special Master is empowered, initially, to consider any claims regarding the OSM systems.

D. The Public Interest Will Not Be Served by Granting
Emergency Injunctive Relief

In light of the foregoing – plaintiffs' failure to establish the substantial likelihood of prevailing on the merits, the absence of any harm, irreparable or otherwise, to plaintiffs from denial of injunctive relief, and the apparent substantial injury to be suffered by the Government and the public if the TRO Motion is granted, the public interest will plainly be furthered by denial of the injunctive relief sought in the TRO Motion.

Conclusion

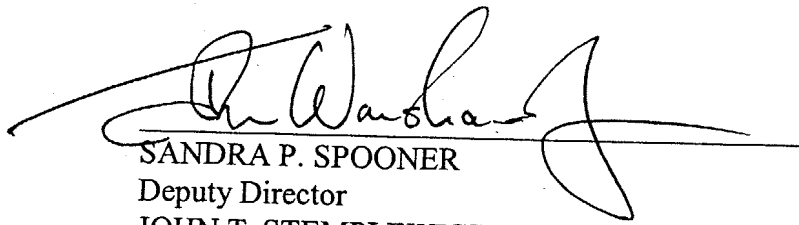
For the foregoing reasons, Interior Defendants respectfully request that the Court deny plaintiffs' TRO Motion.

Respectfully submitted,

ROBERT McCALLUM, JR.
Assistant Attorney General

STUART E. SCHIFFER
Deputy Assistant Attorney General

J. CHRISTOPHER KOHN
Director

A large, stylized handwritten signature in black ink, appearing to read 'Sandra P. Spooner', is written over the printed name and title.

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July 1, 2002

**INTERIOR DEFENDANTS'
EXHIBIT 1 OMITTED FROM
PUBLIC FILING. IT IS
INCLUDED IN INTERIOR
DEFENDANTS' UNOPPOSED
MOTION TO FILE UNDER
SEAL DISCUSSION
REGARDING PROTECTED
REPORT ISSUED BY SPECIAL
MASTER'S EXPERT**